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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

October Term, 1983

SUSAN LEE CULTEE, DEBORAH CULTEE, KAREN
BEATTY CULTEE, and BRENDA LEE CULTEE,
Petitioners,

v.

UNITED STATES OF AMERICA,
WILLIAM P. CLARK,
Secretary of Interior,
INTERIOR BOARD OF INDIAN APPEALS
and HELENE JAKE,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED

1. Are pretermitted Indian children entitled to the protection of state probate laws in Bureau of Indian Affairs probate proceedings, where the state probate law fills a gap in federal law, and does not conflict with any federal laws or policies?

2. Indians are authorized by federal statute to devise trust property

...in accordance with the then existing laws of the State, or federal laws where applicable, in which said lands are located . . .

25 U.S.C. § 464. Does the decision below violate this statute by prohibiting application of a state pretermitted heir statute in the probate of an Indian will?*

* The caption contains the names of all parties to the proceeding in the court below.

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The Petitioners, children of the decedent William Mason Cultee in this Indian probate proceeding, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit which was entered in this proceeding on August 26, 1983 and the order denying rehearing entered October 20, 1983.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals dated August 26, 1983 is reported at 713 F.2d 1455 (1983). The opinion of the District Court for the Western District of Washington is contained in its order granting defendants' motion for summary judgment dated September 14, 1982 and is unreported. The opinion of the Interior Board of Indian Appeals dated July 27, 1981 is reported at 9 I.B.I.A. 43

(1981). The opinions of the Administrative Law Judge are contained in the Order Denying Petition For Rehearing dated May 1, 1980 and in his Final Order dated February 21, 1980, both of which are unreported.

All of the opinions are set out in the Appendix at the pages indicated in the Table of Contents.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit is dated August 26, 1983 and was entered on the same date. The order denying rehearing in the Ninth Circuit was entered on October 20, 1983. See Appendix at C-1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves 18 U.S.C. § 1161, 25 U.S.C. § 348, 25 U.S.C. § 373, 25 U.S.C. § 464 and 43 C.F.R. §§ 4.260-4.262. See Appendix D.

STATEMENT OF THE CASE

The four petitioners are the daughters of William Mason Cultee, the decedent in this Indian probate case. Cultee died on August 4, 1976, leaving a standard BIA Indian will dated August 14, 1973 which stated that he had "no children" and omitted any mention of the four girls. The will purported to leave all of his property to the private defendant, respondent Helene Jake.

Hearings were held before an administrative law judge of the Department of the Interior on April 5, 1978 and March 29, 1979 for the purpose of determining the heirs or probating the decedent's will. The administrative law judge held that the will was valid, and the children appealed to the I.B.I.A., on the grounds that Cultee lacked testamentary capacity due to his chronic alcoholism, that he suffered from an insane delusion when he stated in the will that he had no children, that he was subject to undue influence on the part of Helene Jake, that the will was invalid for failing to name or expressly

disinherit his children, and that the totality of the facts supported exercise of Departmental discretion to disapprove the will. The I.B.I.A. affirmed the order approving the will. That constituted final agency action in this case.

In September of 1981, the children filed suit in District Court seeking a declaration that the BIA will was invalid.¹ They contended that 25 U.S.C. § 464 required the BIA to use state probate laws in Indian probates, where the state laws were not inconsistent with federal Indian laws or policies. They further contended that under Washington State law, Cultee's will would be invalid for failing to mention or expressly disinherit his daughters.²

The District Court upheld the will, holding that approval of the will by the Secretary of the Interior was sufficient to establish its validity. The Ninth Circuit affirmed, but on the rationale that 25 U.S.C. § 464 was intended to incorporate state law only as to the determination of "heirs" but not as to the determination of the validity of a will.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should issue because the opinion below is in conflict with the principle established by this Court in *Rice v. Rehner*, 103 S. Ct. 3291 (decided July 1, 1983).

To elaborate briefly:

Indian land was originally held communally. Congress changed this in the General Allotment Act of 1887 by providing for the allotment of parcels of land to individual

1. The District Court had jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. §1361 (mandamus), and 5 U.S.C. §§ 701-706 (review of agency action). See *Toosknippah v. Hickel*, 397 U.S. 598 (1970), holding Interior Department action regarding Indian wills subject to judicial review.

2. The Washington State pretermitted heir statute, R.C.W. 11.12.090, is set out in Appendix D.

Indians.³ The title to these lands is held by the United States in trust for the allottee or his heirs. The interests Cultee held at his death had been inherited pursuant to this statute.

The Allotment Act provided that Indian allotments would descend according to the intestacy statutes of the various states. The statute provides:

The law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided. . . .

25 U.S.C. § 348.⁴

Congress authorized Indians to devise their property by will in 1910. The 1910 statute provided that Indian wills would be probated:

... in accordance with regulations to be prescribed by the Secretary of the Interior . . .

25 U.S.C. § 373.⁵ Unlike the earlier statute concerning intestacy, the 1910 testacy statute did not mention state law. In an early case, this Court held that this testacy statute impliedly excluded the operation of state laws. *Blanset v. Cardin*, 256 U.S. 319, 324, 326-27 (1921).

Congress again addressed Indian wills in § 4 of the Indian Reorganization Act of 1934 (the "IRA"). Congress considered and rejected a version of § 4 which allowed devises "in accordance with existing laws."⁶ This language was replaced

3. The General Allotment Act of February 8, 1887, 24 Stat. 388, amended by Act of February 28, 1891, 26 Stat. 794, and by the Act of June 25, 1910, 36 Stat. 855, 25 U.S.C. § 331 *et seq.*

4. Act of February 8, 1887, c. 119, § 5, 24 Stat. 389; Act of March 3, 1901, c. 832, § 9, 31 Stat. 1085.

5. Act of June 25, 1910, 36 Stat. 856, as amended by the Act of February 14, 1913, 37 Stat. 678.

6. This was S. 3645, introduced in the Senate on May 18, 1934. See 78 Cong. Rec. 9071. This version passed the Senate on June 12, 1934 before being rejected by the House. See 78 Cong. Rec. 11139.

by the version that became law, which allows Indians to devise trust property

... in accordance with the then existing laws of the State, or federal laws where applicable, in which said lands are located ... to any member of such tribe ... or any heirs of such member ...

25 U.S.C. § 464 (1976). The plain, grammatical reading of this statute is that Congress intended that Indians could devise trust property in accordance with state laws, or federal laws where applicable.⁷

To resist extending the effect of state laws into Indian affairs, the Ninth Circuit opinion adopts a tortured interpretation of § 464, under which only the determination of "heirs" is decided by reference to state law.

This Court rejected similar reasoning of the Ninth Circuit in its recent reversal in *Rice v. Rehner*, where the issue was whether the State of California could require a federally-licensed Indian trader (who was also a tribal member), operating a general store on an Indian reservation, to obtain a state liquor license in order to sell liquor for off-premises consumption. The relevant statute was 18 U.S.C. § 1161, which provided that liquor transactions in Indian country are not subject to prohibition under federal law, provided those transactions are

... in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country ...

18 U.S.C. 1161, quoted in *Rice v. Rehner*, *supra*, at 3293. This Court rejected the Ninth Circuit's view that federal law barred state regulatory control over reservation liquor transactions, reasoning that

7. The BIA has ignored this mandate. See the statement of authority preceding its will probate regulations at 43 C.F.R. 4.260 (set out in Appendix D) which cites the 1910 statute (25 U.S.C. § 373) but ignores the 1934 statute (25 U.S.C. § 464).

... 'Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall,' ... '[E]ven on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.'

Id., at 3294 [citations omitted].

This decision applies with even greater force here for two reasons. *First*, § 464 does not extend state regulatory control over Indian probates — it only requires that BIA probate judges utilize state laws to fill the gaps in federal Indian probate law; *second*, no one here contends that use of state laws in this manner would interfere with tribal self-government or with any Indian right.

The opinion below reveals the Ninth Circuit's fear that giving effect to § 464 would promote the encroachment of state laws onto Indian reservations or would disserve the purposes of the Indian Reorganization Act. These fears overlook material facts in this case and are totally unfounded, but most importantly, they are in conflict with *Rice v. Rehner*.

From the language of § 464 it is clear that Congress intended to incorporate state laws in order to fill the gaps in federal Indian probate law. This is a sensible statutory scheme. Each state has a well-developed body of law pertaining to wills and probate, tested and refined over years of litigation, case law, and statutory amendments, leading to broadly held private expectations and a measure of predictability in each state. Adoption of comprehensive state laws fills the gaps in probate rules drafted by the bureaucrats of the Indian service. Any particular state laws which might contravene or obstruct federal Indian policy could be excluded or preempted by specific regulations promulgated by Interior, *i.e.*, the "applicable federal law" Congress referred to in 25 U.S.C. § 464.⁸ Federal law must be applied

8. Compare *United States v. Humboldt Fir, Inc.*, 625 F.2d 330 (9th Cir., 1980), affirming *United States v. Humboldt Fir, Inc.*, 426 F. Supp. 292, 296 (N.D. Cal., 1977), applying California's version of the Uniform

to disputes concerning Indian property, but where there are no federal cases, statutes or regulations on point, state statutory and decisional law *which does not conflict* with the objectives and purposes of federal Indian law, should not be displaced.

William Mason Cultee erroneously stated in his will that he had "no children." The Washington Supreme Court considered similar language in *In Re Peterson's Estate*, 74 Wn.2d 91, 95, 442 P.2d 980 (1968):

The statement in the will of the case before us — "I have no children, no children of deceased children, and no adopted children" — is not sufficient naming of a child . . . to satisfy R.C.W. 11.12.090. It is not a designation; it is a denial, and the mistaken denial that he has children seems to us a clear example of a situation in which the statute was intended to operate to protect a forgotten child from being disinherited. There is no indication in the will that the testator remembered the petitioner and intended to disinherit him.

Id. at 95.

We do not advocate the extension of state control onto Indian reservations, nor would reversal herein cause such a result. However, it is clear that Congress intended that BIA probate judges utilize state probate laws to fill the gaps in federal law. Congress' wisdom is borne out here, where federal bureaucrats have failed totally to provide protection to pretermitted children. By refusing to give effect to Congress' reference to state law, the court below has created a conflict with this Court's opinion in *Rice v. Rehner* which must be corrected.

In 1970, Justice Harlan, unaware of § 464, invited the Interior Department to promulgate a regulation protecting Indian children from inadvertent disinheritance.

Footnote 8 (Con't)

Commercial Code to a dispute under an Indian timber sale contract, where federal law provided no guidance on crucial issues in the case.

Tooahnippah v. Hickel, 397 U.S. 598, 619, n.10 (1970) (J. Harlan, concurring).⁹ After 13 years, the Department has not taken heed of his suggestion. Fortunately, Congress' foresight in enacting § 464 makes it unnecessary to leave Indian children unprotected any longer.

Congress is dependent ultimately upon this Court to ensure that its mandates are carried out faithfully. The decision below must be reviewed, not only to give force to Congressional intent, nor solely to resolve the conflict with *Rice v. Rehner*, but also to end this condition of bureaucratic neglect which, if not corrected now, will surely bring tragic and unjust consequences to the lives of Indian children and their families.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

RESPECTFULLY SUBMITTED this 18th day of January, 1984.

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT

By: _____
Samuel J. Stiltner
of Attorneys for Petitioner.

Mason D. Morisset
Of Counsel

9. The *Tooahnippah* Court decided issue concerning Interior Department authority regarding approval or rejection of Indian wills. It seems that that parties did not advise the Court of § 464, for neither the briefs nor the Court's opinion discuss it.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN LEE CULTEE,)
DEBORAH CULTEE, KARNES) No. 82-3632
BEATTY CULTEE, and)
BRENDA LEE CULTEE,)
)
Plaintiffs-Appellants,) D.C. No. 81-1164
)
v.) OPINION
)
UNITED STATES OF)
AMERICA, JAMES G. WATT,)
Secretary of the)
Interior, INTERIOR)
BOARD OF INDIAN APPEALS,)
and HELENE JAKE,)
)
Defendants-Appellees.)
)

Appeal from the United States
District Court for the Western
District of Washington
Hon. John C. Coughenour, District Judge,
Presiding

Arqued and Submitted: June 9, 1983

BEFORE: KILKENNY and FLETCHER, Circuit
Judges, and TAYLOR,* District
Judge.

FLETCHER, Circuit Judge:

The Honorable Fred M. Taylor, Senior Uni-
ted States District Judge for the District
of Idaho, sitting by designation.

The children of William Mason Cultee, a member of the Quinault Indian Nation, seek reversal of the District Court's judgment that Cultee's will, which omitted any mention of his children, is valid under the federal statutes that control testamentary disposition of restricted Indian lands. See 25 U.S.C. §§ 373, 464 (1976). Appellees are the United States and Helene Jake, Cultee's cousin and an enrolled member of the Quinault Tribe, who is the sole beneficiary of Cultee's will. This Court's jurisdiction to hear the appeal rests on 28 U.S.C. § 1291 (1976). We affirm.

I

FACTS

Appellants are the four daughters of William Mason Cultee. Cultee died on August 4, 1976 leaving a will, dated August 14, 1973. The will stated that Cultee had "no children" and left all of Cultee's property to Helene Jake, a cousin, with

whom Cultee had lived during the latter part of his life.1/ The will was prepared by BIA personnel and executed in their presence.

Following Cultee's death, his daughters sought a hearing before the BIA to determine the validity of the will. On April 5, 1978, and March 29, 1979, hearings were held before a Department of Interior Administrative Law Judge. Although the ALJ determined that appellants were Cultee's daughters, he rejected their challenge to the will and confirmed its validity. The children appealed to the Interior Board of Indian Appeals, 2/ which affirmed the ALJ's decision.

In September of 1981, appellants filed suit in United States District Court seeking a declaration that Cultee's will was invalid. They argued that 25 U.S.C. § 464 required the incorporation of state law into the federal statutes that govern the

validity of Indian wills. Appellants argued to the District Court that Cultee's will was invalid under state law for failure to mention or disinherit his daughters. See Wash. Rev. Code § 11.12.090 (1974) (pretermitted heir statute). On defendants' motion for summary judgment, the District Court ruled that an Indian will is valid if it is approved by the Secretary of Interior "before or after [the] testator's death." See 25 U.S.C. § 373 (1976). Since the Secretary had approved Cultee's will in the face of the daughters' challenge, the District Court concluded that as a matter of law, it could not upset the will. Accordingly, summary judgment was granted in favor of appellees.

II

DISCUSSION

The question presented for review, whether the will of William Mason Cultee is valid under the federal statutes that con-

trol the testamentary disposition of Indian property, is purely a question of law. No facts are in dispute. We, therefore, may freely review the District Court's interpretation of the pertinent statutory language. See Turner v. Prod., 707 F.2d 1109, 1114 (9th Cir. 1983); Radobenko v. Automated Equipment Corp., 520 F.2d 540, 543 (9th Cir. 1975).

The dispute between the parties to this appeal appears straightforward. Appellants argue that the validity of Cultee's will is controlled by 25 U.S.C. § 464. Appellees argue that the validity of the will is to be determined by the standards of 25 U.S.C. § 373. The text of each statutory provision is set forth in the margin. 3/ In addition to the language of the statutes, the fact most central to our disposition of this case is that the estate of Cultee includes, as part of its assets, an interest in lands allotted to individual Indians on

the Quinault, Nisqually, and Puyallup Reservations that are still subject to trust or other restrictions on alienation.

Appellants contend that where an Indian's estate includes restricted lands of the type held by Cultee, § 464 requires the Secretary of the Interior to set aside as invalid any will that attempts to devise the Indian testator's property unless the will complies with the requirements of state probate law. To support their argument that Cultee's will must comply with state law, appellants cite language from § 464 which states, "in all instances such [restricted Indian] lands ... shall descend or be devised in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located" (emphasis added). Appellants then conclude that since there is no applicable federal law and Cultee's will fails to comply with the probate law of

Washington, specifically the state pretermitted heir statute, the will is invalid under § 464.

Appellees respond that 25 U.S.C. § 373 (1976) is the primary federal statute governing testamentary disposition of all types of Indian property including allotted tribal lands held in trust or subject to other restrictions on alienation. Appellants cite our opinion in Akers v. Morton, 499 F.2d 44, 46-47 (9th Cir. 1974), for the proposition that, "[t]he sole limit on an Indian testator's freedom to devise restricted lands is the power vested in the Secretary of Interior [by § 373] to disapprove wills." In this case, Cultee's will was approved by the Secretary. Appellees conclude, therefore, that the will meets federal statutory standards. To the extent that appellees admit any relevance in 25 U.S.C. § 464, they suggest that the language in that section "shall descend or be

devised in accordance with ... Federal laws where applicable" (emphasis added) was intended to incorporate into § 464 the exclusive power to approve or disapprove wills granted the Secretary under § 373. Thus appellees conclude that the language in § 464 referring to state law poses no barrier to the validity of Cultee's will since the will was upheld by the Secretary pursuant to § 474.

We cannot accept fully the position advanced by either party. While we agree with appellees that Cultee's will must meet the requirements of 25 U.S.C. § 464, we do not find in that section a requirement that the will's validity be determined by reference to state probate law. Similarly, while we agree with appellants that, to be valid, Cultee's will must be approved by the Secretary of Interior under 25 U.S.C. § 373, we do not find that § 373 permits the Secretary to ignore the limitations on devises

of Indian trust property found in 25 U.S.C. § 464. Our review of the language of both §§ 373 and 464 convinces us that Cultee's will is valid only if it is approved by the Secretary as required by § 373, and that the Secretary may only approve under § 373 those Indian wills that devise trust property in accordance with the restrictions on alienation contained in § 464.

We base this conclusion on the following observations. Section 464 begins with the statement that "[e]xcept as provided in [certain sections of the Indian Reorganization Act,] no sale, devise, gift, exchange or other transfer of restricted Indian lands ... shall be made or approved." (emphasis added). Without the further language of § 464, the effect of this opening clause would be to prohibit any devise of restricted Indian lands of the type held by Cultee. This broad bar would necessarily limit the Secretary's power under § 373 to

approve an Indian will devising such trust property. Subsequently, however, in the proviso clause, § 464 lists certain limited circumstances in which a devise or transfer of restricted Indian lands may be approved:

[S]uch lands ... may, with the approval of the Secretary of Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands ... are located ...; and in all instances such lands ... shall descend or be devised, in accordance with the then existing laws of the state, or federal laws where applicable, in which said lands, are located ..., to any member of such tribe ... or any heirs of such member

(emphasis added). This language permits the Secretary to approve devises of restricted Indian lands to the testator's tribe or to a member of the tribe where the property is located; Estate of Left Hand or John (Johnson) Left Hand, PRS #374 (11346-36), summarized in Digest of Federal Indian Probate Law at 48 (1972), or to the testator's heirs, see Solicitor's Opinion, 54 I.D. 584 (Aug. 17, 1934). See generally

U.S. Dept. of Interior, Office of the Solicitor, Federal Indian Law 813 (1958).

Where an Indian attempts to devise restricted property to his heirs, or to someone other than a person permitted to take under § 464, we interpret the reference to state law in § 464 to identify, by incorporating state law, those persons who are the testator's heirs under state law or, where the objects of the testator's bounty are impermissible under § 464, those who would take as heirs by intestate succession under state law. See H.R. Rep. No. 1285, 96th Cong., 2d Sess. 2, reprinted in 1980 U.S. Code Cong. & Admin. News 2916, 2917 ("Section [464] presently places a restriction on the persons or entities to whom an Indian may devise trust property as follows: (1) to the Indian tribe where the land is located; (2) to any member of such tribe; or (3) to any 'heirs' of the testator. The Department of the Interior has

held that the term 'heirs' must be defined in accordance with the law of the state in which the property is located."). Thus, the net effect of § 464 is to limit the Secretary's discretion to approve Indian wills devising restricted Indian lands to those wills that devise such property to one of the three classes of devisees recognized in the statute.

The reference to state law in § 464 does not, as appellants argue, require an Indian devise of restricted lands to comply with state probate law. Rather, it defines the class of permissible devisees of such lands. This interpretation of the reference to state law, unlike the interpretation proposed by appellants, is consistent with the principle purposes of the Indian Reorganization Act of which § 464 is a part. See F. Cohen, Handbook of Federal Indian Law 147 (1982 ed.) (discussing goals of Indian Reorganization Act, including de-

sire to stop alienation of tribal land). Section 464, therefore, circumscribes the Secretary's authority to approve Indian wills but does not eliminate the requirement of § 373 that an Indian will must be approved by the Secretary.

The requirements of both § 373 and § 464 have been met in this case. The final decision of the Department of Interior Administrative Law Judge who heard appellant's challenge to Cultee's will states:

NOW, THEREFORE, IT IS HEREBY ORDERED testator's Last Will and Testament dated the 14th day of August, 1973, be, and the same is, hereby approved and the Superintendent of the Olympic Peninsula Indian Agency, or his recognized agent, shall, after payment of costs of administration, claims and other heretofore or herein charges against the estate, cause to be made a distribution of the trust estate in accordance with said Last Will and Testament as devised or bequeathed in Clauses: SECOND and RESIDUAL (to HELENE MOWITCHMAN BLACK JAKE) and as described in the estate inventory, said Clauses by this reference made a part hereof as if set forth fully herein; save and except landed interests of the estate situate on the Nisqually

and Puyallup Indian Reservations which are subject to the Indian Reorganization Act of June 18, 1934 (25 USC 464) which are to be distributed to the heirs at law, the four children of the decedent noted above, in equal shares of one-fourth (1/4) each. 4/

...

[FN4] Bureau of Indian Affairs records indicate devisee HELENE MOWITCHMAN BLACK JAKE is an enrolled member of the Quinault [sic] Indian Tribe and certification to this effect is included in the file herewith.

This order approves Cultee's will as required by 25 U.S.C. § 373, but, significantly, it modifies the disposition of property otherwise devised by the will in order to meet the restrictions imposed by 25 U.S.C. § 464 as to whom may be devisees of trust property. The order rejects appellee Jake as the devisee of Cultee's interest in restricted lands located on the Nisqually and Puyallup Reservations because Jake is neither Cultee's heir under state law nor a member of the tribe where the lands are located. See 25 U.S.C. § 464

(1976). The order then determines that appellants are Cultee's heirs at law under "then existing state law," see id., and hence, under § 464, they receive Cultee's interest in lands on the Nisqually and Puyallup Reservations. To the extent Cultee's estate also contains restricted lands on the Quinault Reservation, footnote 4 of the final order indicates that appellee Jake, a member of the Quinault Tribe, is a permissible devisee of these lands consistent with the restrictions imposed by § 464. As modified and approved, therefore, Cultee's will complies with the federal statutory scheme governing testamentary disposition of Indian property and is valid. Accordingly, the judgment of the District Court is

AFFIRMED.

FOOTNOTES

1/ William Mason Cultee's standard Indian will provides:

FIRST.--I desire that all my legal debts be paid, including the expenses of my last illness, funeral, and burial.

SECOND.--I give, devise, and bequeath to--my first Cousin, HELENE MOWITCHMAN BLACK JAKE, Quinault allottee 2031, all of my estate: real, personal or mixed, of whatsoever kind and nature and whatsoever situated, of which I may die seized or ever shall be possessed.

THIRD.--To anyone making any claim against my estate--real or personal, I leave nothing.

FOURTH.--I hereby declare that as of the date of this instrument I am a single person; and that I have no children.

(underscored language appears on BIA will form).

2/ The children contended before the ALJ and the Board that Cultee lacked testamentary capacity, was unduly influenced by appellee Jake, suffered from insane

delusions, and that the will was invalid for failure to mention children. They also argued that the totality of circumstances required disapproval of the will. They did not argue that the will was invalid for failure to comply with 25 U.S.C. § 464 (1976).

3/ Section 373 provides:

§ 373. Disposal by will of allotments held under trust.

Any persons of the age of twenty-one years having any right, title or interest in any allotment held under trust or other patent containnig restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, that no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will

has been approved and it is subsequently discovered that there has been a fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: Provided further, That the approval of the will and the death of a testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: Provided also, That this section and section 372 of this title shall not apply to the Five Civilized Tribes or the Osage Indians.

25 U.S.C. § 373 (1976).

Section 464 provides as follows:

§ 464. Transfer of restricted Indian lands or shares in assets of Indian tribes or corporations: exchange of lands.

Except as provided in sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473,

474, 475, 476 to 478, and 479 of this title, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: Provided, however, That such land or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: provided further, That the Secretary of the Interior may authorize voluntary exchanges of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

25 U.S.C. § 464 (1976). Section 464 was amended in 1980. See Pub. L. No. 96-363, 94 Stat. 1207 (1980). The parties agree, however, that the language of the amendment has no application to this appeal.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
AT SEATTLE

SUSAN LEE CULTEE,)	
DEBORAH CULTEE, KARNES	)	No. 82-3632
BEATTY CULTEE, and)	
BRENDA LEE CULTEE,)	
)	
Plaintiffs-Appellants,	)	D.C. No. 81-1164
)	
v.	)	ORDER GRANTING
	)	DEFENDANTS'
UNITED STATES OF	)	MOTION FOR
AMERICA, JAMES G. WATT,	)	SUMMARY JUDGMENT
Secretary of the)	
Interior, INTERIOR)	
BOARD OF INDIAN APPEALS,)	
and HELENE JAKE,)	
)	
Defendants-Appellees.)	

THIS MATTER came on for consideration upon defendants' Motion for Summary Judgment. Neither party has requested oral argument. Upon due consideration of the applicable pleadings, defendants' Motion for Summary Judgment is GRANTED.

In arriving at this decision the Court notes that the plaintiffs have already had two full factual hearings on the validity

of William Cultee's Will, one before an Administrative Law Judge and the other before the Board of Indian Appeals. At both of these hearings it was found that the testator was competent and that plaintiffs had not fulfilled their burden of demonstrating his incompetence. There are no other factual issues outstanding. Plaintiffs' references to the existence and effect of statutes are questions of law.

Most importantly, this Court finds that 25 U.S.C. § 373 permits an allottee to dispose of his property in any way he wishes provided his will is approved by the Secretary of the Interior before or after testator's death. In Akers v. Morton, 499 F.2d 44 (9th Cir. 1974), the Court held that the Secretary of Interior could only refuse to approve a will if it was irrational or technically deficient. No such showing has been made in this case.

The Clerk of this Court is instructed to

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send uncertified copies of this Order to
all counsel of record.

DATED this 14th day of September, 1982.

/s/

John C. Coughenour
United States
District Judge

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

Interior Board of Indian Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

ESTATE OF WILLIAM MASON CULTEE

IBIA 80-43

Decided July 27, 1981

Appeal from order by Administrative Law
Judge Robert C. Shashall approving Indian
will.

Affirmed. (Reported at 9 I.B.I.A. 43
(1981))

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On August 4, 1976, decedent William Ma-
son Cultee died leaving a will dated August
14, 1973, in which he declared "as of the
date of this instrument, I am a single per-
son; and that I have no children." Dece-
dent's will devised his entire trust estate
to his cousin, appellee Helene Jake. On
February 21, 1980, an order was entered ap-
proving the will. Under the terms of the
order, decedent's trust property located on
the Quinault Reservation passes to ap-

pellee, who, like decedent, is a member of the Quinault Tribe, a tribe organized under the Indian Reorganization Act of 1934 (IRA). 1/Since decedent also owned property on the Nisqually and Puyallup Reservations, both also IRA reservations, his will was ineffective to devise those properties to appellee, who is not a qualified devisee of property located on reservations organized under the IRA where she is neither an heir of decedent nor a member of the tribe exercising jurisdiction over the reserva-

1/ Act of June 18, 1934, 48 Stat. 985, 25 U.S.C. § 464 (1976).

tion. 2/

The Administrative Law Judge found that Susan Lee Cultee, Deborah Cultee, Karen Cultee, and Brenda Lee Cultee, the appellants, were the natural children of decedent and Shirly Beatty, a woman with whom decedent had cohabited. Based upon that finding, he determined that appellants, as heirs of decedent, should inherit the Puyallup and Nisqually trust properties. Appellants petitioned for a rehearing of that part of the February 21 order which approved the devise of the Quinault trust property to appellee. On May 1, 1980, a rehearing was denied, and appeal was taken

2/ Once adopted by a tribe exercising jurisdiction over a designated reservation, section 4 of the Act prior to amendment in 1980, restricted beneficiaries of Indian wills to persons who were heirs at law of the testator or tribal members. Under this classification, appellee was not eligible to inherit the Puyallup and Nisqually properties. Decedent's children, however, would have been eligible to receive any of the properties. See Estate of Willessi, 8 IBIA 295, 309-10, 88 I.D. 561 (1981).

from the order of denial, alleging five errors by the Administrative Law Judge in his order approving will and determining inheritance.

On appeal appellants contend that: (1) Decedent suffered from alcoholism which had reduced his mental capacity to the point where he was incompetent to make a will; (2) decedent suffered from an insane delusion that he had no children; therefore, he did not know the natural recipients of his bounty and was not competent to make a will; (3) decedent made his will under the undue influence of appellee and it was therefore not his own will that he expressed when he devised his trust estate to her; (4) the will violated Departmental directive and should therefore be denied probate by the Department; and (5) the circumstances of the testamentary act require the intervention of the Secretary, under

the holding in Tooahnippah v. Hickel,^{3/} to rewrite the will to conform to conventional patterns of conduct to be expected of rational testators in situations similar to that of decedent.

[1] Appellants' second contention--that decedent's assertion he had no children was an insane delusion--is the focal point of appellants' case before this Board. Thus, although not explicitly stated by appellants, the thrust of their other arguments depends upon this thesis for support. This main contention expounds the assumption that decedent's alcoholism and refusal to recognize his children demonstrate his lack of testamentary capacity.

The record indicates that decedent was married to Iva Bush in 1945 and remained married to her until his death. A child of this marriage born in 1946 died in 1965.

^{3/} 397 U.S. 598 (1970).

Beginning in 1953, decedent cohabited with Shirley Beatty, the mother of appellants. Decedent and Shirley Beatty never married. From 1955 to 1957 decedent was confined at Monroe, Washington, in the state reformatory. Mrs. Beatty testified that although she was married to another man a year before the birth of the youngest appellant in 1960, all four appellants were the natural children of decedent. BIA financial records indicate that while decedent authorized several small payments on behalf of appellants from agency trust funds, he did not expressly acknowledge that any of the four children of Mrs. Beatty were his children. Several documents signed by decedent, however, contain indirect admissions of paternity as to some of the appellants. The Administrative Law Judge found that appellants were the natural children of decedent based upon the circumstances presented by the evidence of record, despite the con-

sistent statements by decedent that he had no children except for the daughter who had died.

In so doing, the Administrative Law Judge determined that despite his ruling that decedent's will was valid, the lapse of the testamentary devise of the Puyallup and Nisqually properties caused by operation of the IRA made necessary a finding concerning the heirs of decedent. 4/The Administrative Law Judge correctly determined appellants to be decedent's children, and, although illegitimate, entitled to share in all decedent's non-Quinault property pursuant to 25 U.S.C. § 371 (1976). As to the determination that Iva Bush is not an heir of decedent, it is noted that she had notice of the hearing, appeared, and has not appealed from the determination

4/ See Estate of Edge, 7 IBIA 53, 56 (1978).

that her marriage to decedent terminated before his death. The decision below, after considering the evidence, held appellants had failed to sustain the burden of proving their contentions concerning decedent's claimed incompetence 5/ for the reason:

[T]here is a difference between an insane delusion and a false belief. An insane delusion is much more than a mere delusion of fact. Where a belief is arrived at through a process of reasoning, even though such reasoning may be regarded by others as faulty or illogical, if the belief is not so contrary to reason that none but a person of an unsound mind can entertain it, it is not such a delusion as may be deemed an insane delusion. Here, as indicated, there is no explanation whatsoever as to the basis of testator's beliefs. Under the circumstances, it is just as reasonable to believe, and in view of the other evi-

5/ Testamentary capacity for purposes of Indian probate is defined consistently with general American jurisprudence, as the requisite mental capacity an Indian testator must possess, including the ability to remember the nature and extent of his property, to recognize the natural objects of his bounty, and to understand the nature of the testamentary act. Estate of Red Eagle, 4 IBIA 52, 82 I.D. 256 (1975).

dence produced in support of his competency, perhaps more reasonable to presume, that his beliefs were the result of conscious and deliberate planning. [Citations omitted.]

Order dated February 21, 1980, at 4.

The whole difficulty with appellants' contention concerning the cause for decedent's denials of paternity is, of course, that there is an obvious and common explanation for his refusal to recognize the children which is explicit in his refusal to authorize regular direct payments to them from his trust funds and his unwillingness to pay regular support payments for them to their mother.^{6/} Since all witnesses agree decedent was otherwise competent, alert, and interested in himself, his community, and the preservation of his In

6/ Fathers of illegitimates may reasonably be presumed to avoid admitting parenthood. Estate of Cottonwood, 7 IBIA 138 (1979); Estate of Quapaw, 4 IBIA 263 (1975). See Attocknie v. Udall, 261 F. Supp. 876 (W.D. Okla. 1966) 390 F.2d 636 (10th Cir. 1968), cert. denied, 393 U.S. 833 (1968).

dian heritage through the prudent transfer of his trust property, it must be concluded that his attitude towards appellants did not derive from mental incapacity.

In Attocknie v. Udall, 261 F. Supp. 876 (W.D. Okla. 1966), 390 F.2d 636 (10th Cir. 1968), cert. denied, 393 U.S. 833 (1968) (a case subsequently ordered dismissed for the reason there was no appeal permitted from the agency's administrative decision), the Oklahoma District Court held in a situation similar to that presented in this appeal that an affirmative denial of paternity by a putative father of an illegitimate child is not evidence of the existence of an insane delusion. The deceased, a Comanche Indian, denied that a named individual was his son and left him nothing in his will. The putative son contested the validity of the will alleging that testator was suffering from an insane delusion at the time of the testamentary act because he denied the

contesting party was the testator's natural child.

The evidence in Attocknie demonstrated that the will was a valid instrument, executed by a competent testator. The hearing examiner held the evidence regarding lack of mental capacity and possible undue influence to be insufficient. Although the hearing examiner determined the contesting party was in fact an illegitimate son, the examiner found that the testator was not suffering from an insane delusion because he stated the contesting party was not his son. The court, quoting from the hearing examiner's opinion, said:

[A]n insane delusion is not merely an erroneous belief. The belief must not only be wrong, it must be unreasonable. It must defy rational explanation or justification. Stated another way an insane delusion must be such that only a person with a deranged or abnormal mind would believe that the "insane delusion" represented the truth or was correct.

261 F. Supp. at 882.

As in the present case, the examiner in Attocknie found that the decedent could have reasonably believed he had no children, but was free to change his belief, stating:

[T]he decedent was free to change his views any number of times on this paternity question for a multitude of reasons which would be plausible, reasonable and understandable ... Under the circumstances the petitioner has filed to prove the first basic element of an "insane delusion." he has failed to establish a false belief. When, as in this case, there is good reason for an honest difference of opinion on facts that are extremely difficult to establish, no single conclusion by any one person is sufficient to hold the opposing views are "false." There are numerable reasons which are logical, understandable, and sensible for the testator's belief as to the paternity of Willis Attocknie, Sr. If, as indicated above, the petitioner has completely failed to prove that the testator's belief was false, there seems to be no useful purpose in exploring the possibility that it was the product of an unsound mind. There is no other evidence whatsoever of lack of mental capacity to make a Will at the time this instrument was executed. The evidence taken in its entirety fails to even suggest mental abnormality or an insane delusion.

The court held that the testator was not suffering from an insane delusion at the time of execution of the will because no one could be "absolutely certain" concerning the identity of the father, since the mother was not married to the decedent:

The examiner's finding as to the paternity of a child born out of wedlock creates no presumption that such conclusion is either correct or is universally shared or that it was shared by the putative father. Under such circumstances there always exists some element of doubt.

261 F. Supp. at 883.

Even though the Administrative Law Judge found the four appellants to be the natural children of decedent, it was neither unreasonable nor an apparent act of insanity on the part of decedent to deny paternity.

[2] Concerning the claim that drunkenness had made decedent incompetent, the record indicates that decedent used his trust money in a prudent manner; he did not spend the money in amounts exceeding his budgeted

payments, and there is no indication that he spent unusual amounts of money for drinking. The recorded testimony tends to indicate that he was given to sporadic excesses. The testimony of a man who supervised decedent at work for eight months indicates that he did not drink at all, much of the time. Decedent suffered from a heart condition that was aggravated by alcohol. On several occasions when he had drunk to excess he was hospitalized for heart failure. The evidence upon which appellants rely to show that decedent was affected by alcoholism appears in several medical reports which note that he was hospitalized following a drinking bout which resulted in an aggravation of his heart condition. Nothing in the reports indicates that decedent's mental faculties were permanently affected by drinking, although it is clear that his heart was so weak it could not withstand alcoholic intoxica-

tion.

The testimony of record also indicates that decedent's obvious demeanor was affected by a chronic ear ailment which affected his balance and tended to give him the appearance of drunkenness. There is no showing that he was under the influence of alcohol or anything else at the time he made his will. There is every indication that his will was the result of careful planning after consultation with his friends and those he considered to be his immediate family. There is inadequate evidence to prove lack of testamentary capacity by virtue of excessive drinking in the record presented. 7/

7/ For a discussion of the effect of demonstrated extreme alcoholism on the ability of an Indian testator to disinherit his wife, see Estate of John J. Akers, 1A-D-18 (Supp.) (Sept. 23, 1968)); Estate of John J. Akers, 1 IBIA 8, 77 I.D. 268 (1970); Estate of John J. Akers, 1 IBIA 246, 79 I.D. 404 (1974); Akers v. Morton, 333 F.

[3] In part, reliance upon the contention that decedent was incapacitated by drinking is also incorporated into the arguments concerning appellee's influence over decedent. Curiously, however, the testimony of the witnesses concerning this aspect of the case indicates that Mrs. Jake sought to influence decedent to quit or

7/ (Continued) Supp. 184 (D. Mont. 1971), aff'd, in Akers v. Morton, 499 F.2d 44 (9th Cir. 1974), cert. denied, 423 U.S. 831 (1975); Estate of John J. Akers, 3 IBIA 300, 82 I.D. 108 (1975). (In Akers the examiner held valid a husband's will disinheriting his wife and ruled that the wife had no dower interests in trust lands purchased with the wife's funds. The Federal courts upheld the 1967 hearing examiner's decision observing however that, in addition to providing the purchase money, the wife had managed the trust lands without her husband's help during the last several years of his life, since the husband was a chronic alcoholic. The Court of Appeals' opinion noted that the case was the result of a coincidence of two prior cases which created a legal condition where "an Indian's devise of restricted lands is less restricted than an Indian's (or a non-Indian's) devise of any other realty. He or she can will that property free from any state law designed to protect a surviving spouse, and there is no Federal law that fills the state law gap.)

moderate his drunken sprees because of the apparent effect they had on his health. She did not drink with him. She actively discouraged him from drinking in her house. There is no indication that she prevailed upon him to devise his trust property to her. There is abundant testimony to indicate however that decedent felt that such a disposition of his trust assets was in his best interest and was consistent with traditional tribal values which he accepted. Although decedent was living at the Jake house shortly before his death, that fact and the opportunities it implies are insufficient to raise an inference of undue influence in Indian will cases. 8/

8/ The line of cases establishing the four-part test in Indian probate will cases noted by the Administrative Law Judge at page 3 of his Feb. 21, 1980, order has eliminated the presumption appellants rely upon to support their contentions concerning undue influence. Estate of Caddo, 7 IBIA 286, 291 (1979); Estate of Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971).

Similarly, appellee's comments concerning appellants' paternity appear to reflect a report of statements made to her by decedent in which he persisted in a denial of fatherhood: it is conceivable that she took these denials at face value. Appellee's conduct in assisting decedent with some of his contacts with BIA in preparation for the will execution was satisfactorily explained. There is no showing of actual misconduct sufficient to support the contention made. Undue influence was not proved and cannot be inferred from the circumstances of record.

[4] Since Tooahnippah v. Hickel, cited above, it has been clear that a will executed in conformity to Departmental regulation is valid, absent proof of the successful imposition of the will of another upon

the Indian testator. 9/The Departmental regulations which apply to Indian wills are those appearing at 43 CFR 4.260-4.262 (1980). Nothing in the regulations requires that an Indian testator mention his children or provide for them, whether legitimate or not.10/The contention that decedent's will fails to conform to Departmental standards for Indian wills is without merit; the will was executed by decedent before two disinterested witnesses in conformity to 43 CFR 4.260(a). Under the

9/ Estate of Hale, 8 IBIA 8, 11, 87 I.D. 64, 66 (1980).

10/ The lack of such regulations was noted in the concurring opinion in Tooahnippah v. Hickel at 619 n.10.

circumstances, nothing more was required.11/

[5] Finally, appellants rely upon the concurring opinion in Tooahnippah v. Hickel for the proposition that decedent should not be allowed to disinherit his children as a matter of public policy, seizing upon Justice Harlan's dictum at 397 U.S. 619 that the Secretary ought to be able to disapprove a will "if the disinheritance can

11/ Appellants rely upon a Bureau of Indian Affairs (BIA) "instruction" which recites: "If a husband, wife, child or grandchild who is an heir is given nothing, the reason must be set out." The origin of this "instruction" is not known; as noted by the decision below at 2 n.3, order of Feb. 21, 1980, the instruction is not a Departmental regulation. The instruction was, however, followed by agency employees in this case, as is explained by the testimony of the witnesses Walezak and Tudlock who explained they were aware of the instruction and questioned decedent about his children. Following his denial of paternity (consistent with his prior conduct in this regard), the denial was inserted into his will in an attempt to comply with the instruction concerning omitted heirs. It thus appears that the BIA instruction is itself the explanation for the statement concerning children which appears in the will.

be fairly said to be the product of inadvertence." The finder of fact below, however, found that the action of the testator was deliberate in this case. 12/The record supports his finding conclusively.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order approving will issued February 21, 1980, is affirmed.

This decision is final for the Department.

/s/

Franklin D. Arness
Administrative Judge

12/ The desirability of more explicit regulations in this area has, as appellants point out, been noted by the United States Supreme Court and other Federal courts. (See Akers v. Morton, cited in n.7.) Until Secretarial action is taken to provide further regulation of this area, however, neither this Board nor the courts can presume to dictate policy in this area. (Earlier regulations were more explicit. For a discussion of the problems arising under the former regulations see Hanson v. Hoffman, 113 F.2d 780, 788 (10th Cir. 1970).)

UNITED STATES DEPARTMENT OF THE INTERIOR²
OFFICE OF HEARINGS AND APPEALS

IN THE MATTER OF)
THE ESTATE OF)
WILLIAM MASON CULTEE)
)
DECEASED QUINAULT)
ALLOTTEE 117-1459 OF THE)
OLYMPIC PENINSULA INDIAN)
AGENCY OF THE STATE OF)
WASHINGTON)
)

ORDER DENYING
PETITION FOR
REHEARING

The final Order Approving Will and Decree of Distribution was entered in this matter on February 21, 1980. Subsequently, a Petition for Rehearing was timely filed with the Bureau of Indian Affairs Olympic Peninsula Indian Agency on April 18, 1980, by Mason D. Morisset, of Ziontz, Pirtle, Morisset, Ernstoff and Chestnut, attorneys for heirs at law, SUZANNE LEE CULTEE, KAREN CULTEE, BRENDA LEE CULTEE and DEBRA CULTEE.

By their Petition, the heirs seek a rehearing for purposes of obtaining an order disapproving decedent's Last Will and

Testament of August 14, 1973, found to be a valid and viable instrument by the said final Order of February 21, 1980. To this end, petitioners set forth in their Petition four asserted grounds for disapproval of the Will based upon the evidence of record. (Petition-p. 4-5). Petitioners do not offer nor portend to offer should a rehearing be granted new and/or additional evidence and therefore rely solely upon the record as it existed on the date of the final Order.

Petitioners' four assertions and their supporting documents thereto are each basically arguments on the facts, or more exactly, upon the purport of the evidence adduced on hearing. I can well understand their interpretation of the evidence since I am certainly not unmindful of the fact there was substantial evidence upon which innumerable inferences could have been raised in support of petitioner's position

on the import of the evidence. However, I am bound by the preponderance of the evidence rule and certainly the preponderance of the evidence in this case clearly compels and supports the final Order of which petitioners are aggrieved. Each of the assertions was completely and adequately addressed in the final Order and I find no basis now in the argument on the Petition for rehearing for expanding upon or recanting my findings.

There is, however, one additional comment in support of the findings contained in the final Order which I wish to make concerning the purported alcohol addiction of the decedent as it related to his activities and the execution of the Last Will and Testament. There was no evidence adduced on hearing decedent, because of alcoholism, lacked the necessary testamentary capacity on the date on which the Will was executed. The Department of the

Interior has consistently held that a showing of a state of habitual drunkenness of itself does not constitute testamentary incapacity. Estate of Nocktusie (Willie) Whiz, IBIA 74-29, 3 IBIA 164. And certainly, petitioners offered nothing, nor the promise of anything, of sufficient weight to overcome the clear and concise testimony of the witness to the Will and other Bureau of Indian Affairs personnel as to the testamentary capacity and competency of the decedent, his full understanding of his act and of the technical propriety of the proceedings.

At this juncture, I find no basis upon which to upset or otherwise conclude there was error in the final Order of February 21, 1980.

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NOW, THEREFORE, IT IS HEREBY ORDERED the
final Order of February 21, 1980, is
affirmed.

Dated this 1st day of May, 1980, at
Portland, Oregon.

/s/

Robert C. Snashall

Administrative Law Judge

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS

IN THE MATTER OF)	
THE ESTATE OF)	
WILLIAM MASON CULTEE)	
)	
DECEASED QUINAULT	)	<u>FINAL ORDER</u>
ALLOTTEE 117-1459 OF THE)		
OLYMPIC PENINSULA INDIAN)		
AGENCY OF THE STATE OF)		
WASHINGTON)	
)	

The matter of the estate of WILLIAM MASON CULTEE and his purported Last Will and Testament of August 14, 1973, came on regularly for hearing at Hoquiam, Washington, on April 5, 1978, and March 29, 1979.

It appears that decedent was an enrolled Quinault Indian who was born on November 16, 1927, and died at the approximate age of 48 years on August 4, 1976, in Aberdeen, Washington, of natural causes. Decedent left a purported Last Will and Testament dated the 14th day of August, 1973, which

was an Indian Will under the Act of June 25, 1910, prepared for him by and executed in the presence of Bureau of Indian Affairs personnel of the Western Washington Indian Agency.¹ Both this Last Will and Testament and the identity of heirs at law gave rise to controversy and although the evidence produced on the questions to be determined was at best equivocal and conflicting, I find the preponderance of the evidence clearly dictates the following findings and conclusions of law.

Decedent and one IVA MARIE BUSH were

¹The Western Washington Indian Agency was divided in 1979 into the Puget Sound Agency and the Olympic Peninsula Agency. Since decedent was a Quinault, it appears agency jurisdiction at present over his estate would be in the Olympic Peninsula Agency.

married under state law on June 15, 1945 and they separated in approximately 1960 with the intent to terminate their marriage in accordance with the custom of Indians of the Quinault Indian Tribe as it existed to and including March 13, 1963.² One child was born of this marriage, Rose Marie Cultee, on April 25, 1946, and the child passed away on July 8, 1965, without issue. Thereafter, decedent lived with one Shirley

²No showing is necessary as to what constitutes an Indian custom divorce (or marriage) under said tribal law as this forum takes judicial notice of the myriad cases defining and explaining what constitutes such actions under said tribal law and the evidence here clearly established the intent of both of these persons to terminate the said marriage within the purview thereof.

Beatrice Beatty (now Modlin) from approximately 1953 until approximately 1960, and although the parties adopted some of the mores of married persons, there was not clearly evidenced the actual intent necessary to an Indian custom marriage. Four children were born of this relationship, Suzanne Lee, born June 5, 1955; Debra, born October 8, 1956; Karen, born February 15, 1958; and Brenda Lee, born November 6, 1960. I was not impressed with the testimony produced by proponents of the Last Will and Testament to the effect these children were not the children of the decedent since each of the persons who so testified, because of timing or the peculiar circumstances of their knowledge of the decedent, would not have known in any event of his marital life and children except insofar as they were so informed by decedent himself. To these people, decedent consistently reported he had no child-

ren. On the other hand, members of decedent's family and old friends all testified in affirmation of the paternity of these children as being those of the decedent and this affirmation was buttressed by extensive Bureau of Indian Affairs documentation and the testimony of Bureau of Indian Affairs personnel who were not only personally aware of the existence of the children but to whom decedent had admitted paternity of at least two. Suffice it to say, the preponderance of the evidence established WILLIAM MASON CULTEE was the father of the four purported children.

As to the Last Will and Testament of the deceased of August 14, 1973, opponents tacitly acknowledge the document was prepared and executed properly and explicitly acknowledge the decedent was sober, lucid and generally legally competent to so execute the document. They strenuously assert, however, the document reflects the

undue influence of the primary devisee upon the decedent and that in any event, the decedent's stern, persistent insistence he had no family, and particularly lineal descendants, was an insane delusion mandating legal nullification.³

Opponents assertion of undue influence is untenable as clearly not supported by the preponderance of the evidence. The Department has consistently set forth the four basic ingredients which must be

³ Opponents also contend Secretarial regulations require a testator to expressly disinherit any living children, but I know of no such regulation. The directive alluded to is merely a will drafting instruction of the Bureau of Indian Affairs used for ministerial clarification purposes and does not rise to the stature of a regulation.

substantiated by the contestants of a Last Will and Testament if the Will is to be invalidated on the basis of undue influence. These four criteria have been so consistently reported and adhered to by the Department that both opponents and proponents have alluded to them in their memorandum in support of their individual positions and they need not be set forth here. See Estate of William Robedeaux, 1 IBIA 109 (July 20, 1971). The Interior Board of Indian Appeals has consistently held that if any one of these elements is missing, the allegation of undue influence is insufficient, as is mere suspicion. Such evidence as was offered by opponents in support of their contention of undue influence was weak and unconvincing and, of itself, more readily acceptable to an antithetical interpretation. Admittedly, there was evidence decedent's judgment suffered some deterioration as a result of years of

drinking as well as evidence of a confidential relationship existing between the beneficiary Helene Jake and the decedent, and that she exercised some influence upon him. But other and substantial evidence served to illustrate a man who, although "in the clutches of the demon drink", knew the extent of his property, was interested in maintaining the Indian's base in such property, gave no indication whatsoever of deteriorating mental competency in dealing with others and exuded a friendly, helpful and appreciative demeanor. There was not one scintilla of evidence of his susceptibility to the domination of another nor that such influence as was exercised against him was calculated to induce or coerce the decedent to make a Will contrary to his own desires. The evidence on the part of Helen Jake to influence him was neither harmful nor legally wrong. The uncontradicted testimony being that Mrs. Jake

sought to obtain assistance in aid of curbing decedent's alcoholic intake. Estate of George E. Easley, IA-T-32 (July 13, 1978). Since the record does not disclose that Mrs. Jake had any actual knowledge of decedent's former marriages and children, it seems logical to conclude her activities in connection with the Last Will and Testament were for purposes of aiding and supporting decedent in effectuating and fulfilling his wishes. As indicated, I find and conclude opponents have failed to establish undue influence on the part of any party in interest.

By like token, I am not satisfied opponents have carried the burden of establishing decedent lacked testamentary capacity by virtue of an insane delusion that he had no family and particularly children. It is a well established law of the Department that where the proponents of a Will establish its due execution and attestation,

a presumption of testamentary capacity arises, such that the burden of proof rests with contestants to prove otherwise. Estate of William Cecil Robedeaux, 1 IBIA 106, 78 Id 234 (July 20, 1971). Opponents base their contention decedent was suffering insane delusions solely on decedent's continuous and emphatic statements to others to the effect he had no family and/or he had no children. No substantial explanation was offered by either opponents or proponents as to why decedent made such protestations and accordingly, opponents seize on this lack of explanation as evidencing decedent's delusionary affliction. Opponents cite the Will itself as overwhelming evidence of this factor wherein decedent states, "I hereby declare that as of the date of this instrument, I am a single person; and that I have no children." Exhibit 10. But in view of my finding above that the testator was in

sound mental condition at the time the Will was executed, the words of disinheritance cannot be solely relied upon to show the alleged insane delusion so as to seek disapproval of the Last Will and Testament on the grounds of testamentary incapacity. Estate of Melvin (Charles) Quapaw, 1A-1336 (May 17, 1966). The evidence and record do reflect, however, that for some unknown reason, decedent for some 15 years prior to his death consistently and unequivocally proclaimed he was a single man without children. Unfortunately, employees of the Bureau of Indian Affairs to whom he had admitted paternity in days past for some inexplicable reason failed to fully query decedent on the basis of his beliefs before blithely accepting his contentions and incorporating them in his Last Will and Testament. The friends of decedent who knew him and associated with him and who testified as to such association throughout

the last 15 years of decedent's life either were such as to have had no personal knowledge of decedent's earlier domestic life without decedent so advising them or, if with such knowledge, failed to seek an explanation. It is inconceivable.

Be that as it may, even opponents in their post-trial brief acknowledge decedent's failure to tell these individuals that he had children does not conclusively show that he actually believed he had no children, although they do contend it is evidence of that unfounded and false believe. (Op Brief p 17). But there is a difference between an insane delusion and a false belief. An insane delusion is much more than a mere delusion of fact. Where a belief is arrived at through a process of reasoning, even though such reasoning may be regarded by others as faulty or illogical, if the believe is not so contrary to reason that none but a person of an unsound mind

can entertain it, it is not such a delusion as may be deemed an insane delusion. Estate of George E. Easley, supra, 1
Bowe-Parker: Page on Wills, 12.32. Here, as indicated, there is no explanation whatsoever as to the basis of testator's beliefs. Under the circumstances, it is just as reasonable to believe, and in view of the other evidence produced in support of his competency, perhaps more reasonable to presume, that his beliefs were the result of conscious and deliberate planning. One must remember that a Will may be capricious, unjust, spiteful, eccentric, revengeful or unjudicious and not be invalid. 1 Bowe-Parker: Page on Wills, 3.11. I am satisfied opponents have failed to carry the burden of overcoming the prima facie validity of the Last Will and Testament by a preponderance of the evidence and that the record as a whole supports the probability of a rational basis for decedent's

actions.

It is also well-established that the failure of a testator to provide for his wife or children in a Will does not invalidate the Will. Estate of George Yellow Wolf, 5 IBIA 70 (April 13, 1976).

NOW, THEREFORE, IT IS HEREBY ORDERED testator's Last Will and Testament dated the 14th day of August, 1973, be, and the same is, hereby approved and the Superintendent of the Olympic Peninsula Indian Agency or his recognized agent, shall, after payment of costs of administration, claims and other heretofore or herein charges against the estate, cause to be made a distribution of the trust estate in accordance with said Last Will and Testament as devised or bequeathed in Clauses: SECOND and RESIDUAL (to HELEN MOWITCHMAN BLACK JAKE) and as described in the estate inventory, said Clauses by this reference made a part hereof as if set forth fully

herein: save and except landed interests of the estate situate on the Nisqually and Puyallup Indian Reservations which are subject to the Indian Reorganization Act of June 18, 1934 (25 USC 464) which are to be distributed to the heirs at law, the four children of the decedent noted above, in equal shares of one-fourth (1/4) each.⁴

Other information relative to heirs and beneficiaries required by 43 CFR 4.240 (c) (1), (2), (4) is contained in the Data for Heirship finding and Family History of record herein and said information together with the estate inventory and appraisement of trust real property, attached hereto,

⁴Bureau of Indian Affairs records indicate devisee HELEN MOWITCHMAN BLACK JAKE is an enrolled member of the Quinault Indian Tribe and certification to this effect is included in the file herewith.

are by this reference made a part hereof.

Subject to the provisions of 43 CFR 4.251, the general claim of Coleman Mortuary, Inc., P.O. Box 441, Hoquiam, WA 98550 for balance of funeral expenses in the sum of \$807.96 and the third priority claim of Quinault Tribal Enterprises, P.O. Box 1177, Taholah, WA 98587 for purchase of fishing equipment in the sum of \$568.59 are hereby allowed.

Petitions having been filed for the allowance of attorney's fees by the firms of Ziontz, Pirtle, Morisset, Ernstoff and Chestnut on behalf of the four heirs at law indicated above and by the Stritmatter and Stritmatter as counsel for Helene Jake, and good cause appearing for the allowance of fair and reasonable sums therefore as herein adjusted, the law firm of Ziontz, Pirtle, Morisset, Ernstoff and Chestnut is allowed attorney's fees in the sum of \$15,414 plus costs and disbursements in the

sum of \$899.89, all as a charge against and to be paid from the estate interests of the above-named heirs at law, children of the decedent, in equal shares as their individual interests may appear; and the firm of Stritmatter and Stritmatter is allowed attorney's fees in the sum of \$6,540 plus costs and disbursements in the sum of \$241 as a charge against and to be paid from the estate interests of Helene Jake; all payments to be made in accordance with 43 CFR 4.281.

The estate of said decedent subject to the jurisdiction of this Department having been valued at \$35,821.66, a fee of \$75.00 shall be collected by the Superintendent or other officer in charge at the Olympic Peninsula Indian Agency, pursuant to the Act of January 24, 1923 (25 USC 377).

Dated this 21st day of February, 1980,
at Portland, Oregon.

/s/

Robert C. Snashall
Administrative Law Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN LEE CULTEE,)	
DEBORAH CULTEE, KARNES	)	No. 82-3632
BEATTY CULTEE, and)	
BRENDA LEE CULTEE,)	
)	
Plaintiffs-Appellants,	)	D.C. No. 81-1164
)	
v.	)	ORDER
)	
UNITED STATES OF)	
AMERICA, JAMES G. WATT,)	
Secretary of the)	
Interior, INTERIOR)	
BOARD OF INDIAN APPEALS,)	
and HELENE JAKE,)	
)	
Defendants-Appellees.)	

Before: KILKENNY and FLETCHER, Circuit
Judges, and TAYLOR, District Judge.

The panel in this case has voted to deny
the petition for rehearing.

The full court has been advised of the
suggestion for rehearing en banc and no
judge of the court has requested a vote on
the suggestion. Fed. R. App. P. 35(b).

The suggestion for rehearing en banc is
hereby rejected.

[Filed October 20, 1983]

§ 1161. Application of Indian liquor laws

The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register. Added Aug. 15, 1953, c. 502, § 2, 67 Stat. 586.

§ 348. Patents to be held in trust; descent and partition

Upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in the case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his dis-

cretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided: And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is

held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: Provided, however, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: And provided further, That no pat-

ents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years' occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at 3 per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the Bureau of Land Management, and afterwards

delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization was occupying on February 8, 1887, any of the public lands to which this Act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this Act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of

this Act and become citizens of the United States shall be preferred.

Provided further, That whenever the Secretary of the Interior shall be satisfied that any of the Indians of the Siletz Indian Reservation, in the State of Oregon, fully capable of managing their own business affairs, and being of the age of twenty-one years or upward, shall, through inheritance or otherwise, become the owner of more than eighty acres of land upon said reservation, he shall cause patents to be issued to such Indian or Indians for all of such lands over and above the eighty acres thereof. Said patent or patents shall be issued for the least valuable portions of said lands, and the same shall be discharged of any trust and free of all charge, incumbrance, or restriction whatsoever; and the Secretary of the Interior is authorized and directed to ascertain, as soon as shall be practicable, whether any of said Indians

of the Siletz Reservation should receive patents conveying in fee lands to them under the provisions of this Act.

(Feb. 8, 1887, c. 119 § 5, 24 Stat. 389; Mar. 3, 1901, c. 832 § 9, 31 Stat. 1085; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.)

25 U.S.C. 373, Section 2 of the Act of June 25, 1910, 36 Stat. 856, as amended by the Act of February 14, 1913, 37 Stat. 678:

§ 373. Disposal by will of allotments held under trust

Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior; Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior; Provided, further, That the Secretary of the In-

terior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been a fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: Provided further, That the approval of the will and the death of a testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir

or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: Provided also, That sections one and two of this Act shall not apply to the Five Civilized Tribes or the Osage Indians.

25 U.S.C. 464, Section 4 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 985, as amended by the Act of September 26, 1980, 94 Stat. 1207:

§ 464. Transfer or exchange of lands or assets -- Descent

Except as provided in sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accor-

dance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: Provided further, That the Secretary of the Interior may authorize voluntary exchanges of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

Title 43 - Public Lands: Interior

Subtitle A - Office of the Secretary
of the Interior

Subpart D - Rules Applicable Indian
Affairs Hearings and Appeals

AUTHORITY: Secs.1, 2, 36 Stat. 855, as amended, 856, as amended, sec. 1, 38 Stat. 586, 42 Stat. 1185, as amended, secs. 1, 2, 56 Stat. 1021, 1022; R.S. 463, 465; 5 U.S.C. 301; 25 U.S.C. secs. 2, 9, 372, 373, 374, 373a, 373b.

* * * *

WILLS

§ 4.260 Making, review as to form;
revocation.

(a) An Indian of the age of 21 years or over and of testamentary capacity, who has any right, title, or interest in trust property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses.

(b) When an Indian executes a will and submits the same to the Superintendent of the Agency, the Superintendent

shall forward it to the Office of the Solicitor for examination as to adequacy of form, and for submission by the Office of the Solicitor to the Superintendent of any appropriate comments. The will or codicil or any replacement or copy thereof may be retained by the Superintendent at the request of the testator or testatrix for safekeeping. A will shall be held in absolute confidence, and no person other than the testator shall admit its existence or divulge its contents prior to the death of the testator.

(c) The testator may, at any time during his lifetime, revoke his will by a subsequent will or other writing executed with the same formalities as are required in the execution of a will, or by physically destroying the will with the intention of revoking it. No will that is subject to the regulations of

this subpart shall be deemed to be revoked by operation of the law of any State.

[36 FR 7186, Apr. 15, 1971, as amended at 36 FR 21284, Nov. 5, 1971; 36 FR 24813, Dec. 23, 1971]

§ 4.261 Anti-lapse provisions.

When an Indian testator devises or bequeaths trust property to any of his lineal descendants, mother or father, brothers or sisters, either of the whole or half-blood or their issue, and the devisee or legatee dies before the testator leaving lineal descendants, such descendants shall take the right, title, or interest so given by the will per stirpes. Relationship by adoption shall be equivalent to relationship by blood.

§ 4.262 Felonious taking of testator's life.

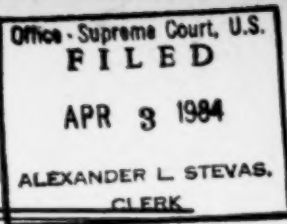
No person who has been finally convicted of feloniously causing the death or taking the life of, the testator, shall take directly or indirectly any devise or legacy under the deceased's will. All right, title, and interest existing in such a situation shall vest and be determined as if the person convicted had never existed, notwithstanding § 4.261.

REVISED CODE OF WASHINGTON

11.12.090 Intestacy as to pretermitted children. If any person make his last will and die leaving a child or children or descendants of such child or children not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, as to such child or children not named or provided for, shall be deemed to die intestate, and such child or children or their descendants shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part.

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No. 83-1204



In the Supreme Court of the United States

OCTOBER TERM, 1983

SUSAN LEE CULTEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

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QUESTION PRESENTED

Whether 25 U.S.C. 464 requires that Indian wills devising trust property comply with state probate laws.

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*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 713 F.2d 1455. The opinion of the district court (Pet. App. B1-B3) is unreported. The opinion of the Interior Board of Indian Appeals (Pet. App. B4-B24) is reported at 9 IBIA 43. The opinion of the administrative law judge (Pet. App. B30-B46) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1983. A petition for rehearing was denied on October 20, 1983 (Pet. App. C1). The petition for a writ of certiorari was filed on January 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 4, 1976, William Mason Cultee, an enrolled Quinault Indian, died, leaving a will dated August 14, 1973. This will had been prepared for him by, and executed in the presence of, Bureau of Indian Affairs (BIA) personnel. By this will, Cultee left his entire estate to a cousin, respondent Helene Jake, with whom he had resided during the latter part of his life.¹

2. Petitioners challenged the validity of the will in an administrative proceeding, claiming to be the children of decedent Cultee. They argued that Cultee lacked the testamentary capacity to execute a will; that the beneficiary under the will had exerted undue influence on Cultee; and that the will did not comply with a departmental regulation instructing BIA personnel to assure that children to be disinherited be named in the will. Following a hearing, the administrative law judge entered an order determining the will to be valid with respect to the entire estate (Pet. App. B30-B46), with the exception of certain land located on the Nisqually and Puyallup Reservations that could be distributed only to Cultee's heirs at law (*id.* at B44). The ALJ

¹This will, typed on the standard BIA form, contained the following provisions (Pet. App. A16):

FIRST. — I desire that all my legal debts be paid, including the expenses of my last illness, funeral, and burial.

SECOND. — I give, devise, and bequeath to — my first Cousin, HELENE MOWITCHMAN BLACK JAKE, Quinault allottee 2031, all of my estate: real, personal or mixed, of whatsoever kind and nature and whatsoever situated, of which I may die seized or ever shall be possessed.

THIRD. — To anyone making any claim against my estate — real or personal, I leave nothing.

FOURTH. — I hereby declare that as of the date of this instrument, I am a single person; and that I have no children.

The italicized portion was preprinted on the BIA form.

found that a preponderance of the evidence established that Cultee was the father of the four petitioners (*id.* at B34), and therefore petitioners were entitled to inherit the Nisqually and Puyallup land (*id.* at B44). The Interior Board of Indian Appeals affirmed (*id.* at B4-B24).

3. On September 28, 1981, petitioners filed a complaint in the United States District Court for the Western District of Washington contending: (1) that the Department of the Interior's failure to follow its instructions regarding naming children in a will was a denial of due process; (2) that the failure to follow that instruction was also a violation of 25 U.S.C. 373; and (3) that the approval of the will was an abuse of discretion and arbitrary and capricious. Petitioners subsequently amended their complaint to include a fourth ground for relief, namely, that the Department's failure to promulgate regulations protecting pretermitted heirs was a denial of due process and equal protection. In their brief in response to respondent Jake's motion to dismiss, petitioners advanced for the first time the argument they now urge to this Court: namely, that 25 U.S.C. 464 requires that Indian wills disposing of trust property comply with state law² and, hence, that Cultee's will was invalid for failure to comply with Washington's pretermitted heir statute, Wash. Rev. ~~Code~~ Code 11.12.090 (1974) (set forth at Pet. App. D18).³

²The text of 25 U.S.C. (1976 ed.) 464 is set forth at Pet. App. D12-D13. That statute was amended in 1980 by substituting for the phrase "heirs of such member" the more expansive category of "heirs or lineal descendants of such member or any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust." The amendment does not apply to this case and, in any event, would have no effect on its resolution.

³Petitioner contends that under Washington law Cultee could disinherit his children only by naming them in the will. The statement that he had no children would not be sufficient. See Pet. 7.

The district court granted respondent Jake's motion for summary judgment on the ground that "25 U.S.C. § 373 permits an allottee to dispose of his property in any way he wishes provided his will is approved by the Secretary of the Interior before or after [the] testator's death" (Pet. App. B2). The district court did not specifically address the relevance of the state statute.

The Ninth Circuit affirmed (Pet. App. A1-A16). The court rejected petitioners' contention that 25 U.S.C. 464 requires Indian wills disposing of trust property to comply with all the particulars of state probate law. The court explained that Indian wills devising restricted property are subject to the requirement of 25 U.S.C. 373 that they be approved by the Secretary of the Interior. Section 464 establishes a further limitation on the persons or entities to whom an Indian may devise trust property, limiting such bequests: (1) to the Indian tribe where the land is located; (2) to any member of that tribe; or (3) to any "heirs" of the testator. The Court explained that the reference to state law in the statute simply designated state law as the source for defining these limitations, specifically, the term "heirs." Pet. App. A9-A12. Thus, the court concluded (*id.* at A12): "The reference to state law in § 464 does not, as [petitioners] argue, require an Indian devise of restricted lands to comply with state probate law. Rather, it defines the class of permissible devisees of such lands."

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, it does not warrant review by this Court.

1. Petitioners argue (Pet. 5-7) that a "plain grammatical reading" of 25 U.S.C. 464 shows that Congress intended to incorporate state law in Indian probate "to fill the gaps in

federal law." This reading is plainly mistaken. The statute requires that restricted Indian lands or shares in the assets of an Indian tribe or corporation organized under the Indian Reorganization Act (25 U.S.C. (1976 ed.) 464 (emphasis added)):

descend or be devised, in accordance with the then existing laws of the State, or *Federal laws where applicable*, in which said lands are located * * * to any member of such tribe * * * or any heirs of such member.

Therefore, the statute, enacted in 1934, clearly continues to respect preexisting federal law embodied in 25 U.S.C. 373, which establishes that Indian wills devising trust allotment lands are subject to approval by the Secretary of the Interior, but not to the nuances of state probate law.

In *Blanset v. Cardin*, 256 U.S. 319 (1921), the Court made plain that Indian wills are free from generally applicable state probate restrictions. The Court stated (*id.* at 326-327):

[I]t was the intention of Congress that this class of Indians should have the right to dispose of property by will under this act of Congress, free from restrictions on the part of the State as to the * * * objects of the testator's bounty, provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior.

Subsequent decisions, even after the enactment of Section 464, have not deviated from this view. See, e.g., *Tooahnipah v. Hickel*, 397 U.S. 598, 613 (1970); *Blundell v. Wallace*, 267 U.S. 373, 377 (1925); *Akers v. Morton*, 499 F.2d 44, 47-48 (9th Cir. 1974); *Homovich v. Chapman*, 191 F.2d 761, 764 (D.C. Cir. 1951); *Hanson v. Hoffman*, 113

F.2d 780, 789 (10th Cir. 1940).⁴ The Department's administrative rulings likewise reflect the view that the federal law governing wills disposing of Indian trust property excludes the general application of state probate law. See, e.g., *Estate of Carrie Standing Haddon Miller*, 10 I.B.I.A. 128 (Oct. 5, 1982) (state formalities regarding execution of wills not applicable to Indians' wills); *Estate of Roe Kahrahrhah*, 81 Interior Dec. 613 (1974) (state substantive requirements regarding pretermitted heirs not applicable to Indian wills). And, as the court of appeals noted (Pet. App. A11-A12), when Congress recently amended the statute (see note 2, *supra*), it recognized and approved this administrative interpretation of Section 464. H.R. Rep. 96-1285, 96th Cong., 2d Sess. 2 (1980). Against this background, petitioners point to nothing in the legislative history of Section 464 to indicate that it was intended to work such a fundamental change in the law.⁵

2. Petitioners contend (Pet. 5-7) that the decision below conflicts with *Rice v. Rehner*, No. 82-401 (July 1, 1983). The short answer to this contention is that *Rehner* has nothing to do with this case. In *Rehner*, the Court held that 18 U.S.C. 1161 authorized a state to subject a store on an Indian reservation, which sold liquor for off premises

⁴Indeed, Justice Harlan's concurring opinion in *Tooahnippah*, in recognizing that the *Secretary* might pass a regulation analogous to state pretermitted heir statutes, quite clearly demonstrates the Court's understanding that state probate laws do not apply to Indian wills devising trust property. See 397 U.S. at 619 n.10.

⁵The reference to state law in Section 464 is not superfluous under the court of appeals' holding. If the Indian dies intestate, Section 464 requires that the property descend in accordance with the intestate succession of the state in which the land is located. Similarly, Section 464 limits the Secretary's discretion in approving wills devising trust property. One of the three permissible classes of devisees are "heirs" of the testator, as defined by state law. See Pet. App. A11.

consumption, to state liquor licensing. The statute involved in *Rehner* and the general area of law are radically different from that involved here.

First, the language of 25 U.S.C. 464 explicitly recognizes and retains federal law where it is applicable; the language of 18 U.S.C. 1161 does not. Rather, Section 1161 provides that liquor transactions in Indian country are not prohibited under federal law provided "those transactions are 'in conformity both with the laws of the State * * * and with an ordinance duly adopted by the tribe * * *.'" *Rice v. Rehner*, slip op. 2. This Court read this statute as delegating authority to the states and the tribes to regulate the distribution and use of alcoholic beverages. But 25 U.S.C. 464 does not explicitly delegate authority to the states or incorporate state probate law and should not be read that way since the statute specifically recognizes and retains all applicable federal law in Indian probate.

Second, in contrast to the history of concurrent state and federal control over the distribution of alcoholic beverages on Indian reservations, there is no historical tradition of concurrent state and federal jurisdiction over Indian probate with respect to trust property.⁶ Descent and distribution of trust allotments, such as are involved here, are governed by federal statutes. See generally 25 U.S.C. 371-380. As noted above, 25 U.S.C. 373 vests the exclusive authority to determine the validity of a will with the Secretary of the Interior.⁷ And, as noted earlier, the longstanding

⁶Unrestricted or non-trust property owned by deceased Indians is generally subject to the jurisdiction of the tribe or the state, depending on where the deceased Indian was domiciled and whether the property is located within Indian country. See *Blundell v. Wallace*, *supra*; *Jones v. Meehan*, 175 U.S. 1 (1899).

⁷This Court has held, however, that the Secretary's authority under 25 U.S.C. 373 to disapprove a will is not unlimited; it must be exercised to give effect to the deceased Indian's intent unless the disposition is "so

interpretation of the responsible agency here is that Section 464 does not incorporate state probate law. In *Rehner*, by contrast, the Court noted that an opinion of the Solicitor of the BIA supported the view that state licensing laws were applicable. Slip op. at 15-16.

Finally, a state's interest in regulating the sale and distribution of alcoholic beverages differs significantly from any interest it may have in the probate of restricted Indian property. The probate of restricted property has no "spill-over effect," *i.e.*, it has no off-reservation effect that necessitates state intervention. Compare *Rice v. Rehner*, slip op. 10-11. Pursuant to Section 464 itself, only members of a tribe or the specified heirs of a member of a tribe may receive restricted Indian lands by descent or devise. The state has no interest in imposing its probate laws on the devise of restricted Indian lands.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE

Solicitor General

F. HENRY HABICHT, II

Assistant Attorney General

JACQUES B. GELIN

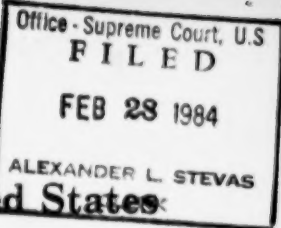
J. CAROL WILLIAMS

Attorneys

APRIL 1984

lacking in rational basis that the Secretary's approval could reasonably be withheld * * *." *Tooahnippah v. Hickel*, 397 U.S. at 610. Under petitioner's view, however, state probate law would override Cultee's desire to leave his property to the cousin with whom he had lived, rather than leave it to these children whom he did not recognize as his own.

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IN THE
Supreme Court of the United States

October Term, 1983

SUSAN LEE CULTEE, DEBORAH CULTEE, KAREN
BEATTY CULTEE, and BRENDA LEE CULTEE,
Petitioners,

v.

UNITED STATES OF AMERICA
WILLIAM P. CLARK,
Secretary of Interior,

INTERIOR BOARD OF INDIAN APPEALS
and HELENE JAKE,
Respondents.

HELENE JAKE'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

SUSAN LEE CULTEE, DEBORAH CULTEE, KAREN
BEATTY CULTEE, and BRENDA LEE CULTEE,
Petitioners,

v.

UNITED STATES OF AMERICA,
WILLIAM P. CLARK,
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Respondents.

HELENE JAKE'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Mrs. Helene Jake, the sole heir under
the terms of the will of William Mason
Cultee, and one of the respondents here-
in, respectfully prays that the Court deny
the Petition for a Writ of Certiorari
sought for the purpose of reviewing the
Judgment and Opinion of the United States

Court of Appeals for the Ninth Circuit entered on August 26, 1983, and the subsequent Order Denying Rehearing entered on October 20, 1983.

STATEMENT OF THE CASE

William Mason Cultee, an enrolled member of the Quinault Indian Tribe, died on August 4, 1976, leaving a will dated August 14, 1983, which named as his sole heir his first cousin, Mrs. Helene Jake, also an enrolled member of the Quinault Indian Tribe and with whose family he had resided during the final years of his life. Mr. Cultee's will had been prepared for him and formally witnessed by employees of the Bureau of Indian Affairs in Everett, Washington. (1) (2) Mr. Cultee's will was prepared on the standard government will form #5-5407. At the same time Mr. Cultee

(1) The complete content of the Last Will and Testament of William Mason Cultee is attached as Appendix A.

(2) The complete content of the Affidavit to Accompany Indian Will is attached as Appendix B.

executed his will, another employee of the Bureau of Indian Affairs prepared and signed a supplemental Affidavit form #5-5408 in which that employee swore that he had prepared the will as requested by Mr. Cultee. (3)

After the will was executed, it was sent to the Office of the Regional Solicitor of the Department of Interior by the Superintendent of the Western Washington Agency of the Bureau of Indian Affairs. The Superintendent stated on the transmittal document that the heir, Mrs. Helene Jake, the respondent herein, was eligible to take under Mr. Cultee's will. The Regional Solicitor certified on August 23, 1973, to the Superintendent that Mr. Cultee's will was satisfactory as to form.

After Mr. Cultee's death the four petitioners in this case first claimed that they were the illegitimate children of Mr.

(3) The complete text of supplemental Affidavit is attached as Appendix C.

Cultee and one Shirley Beatty Modlin, a woman with whom Mr. Cultee had lived in 1953 and occasionally thereafter until 1960. Mr. Cultee did not marry Ms. Modlin either under the laws of the State of Washington or by Indian custom marriage. Mr. Cultee had been legally married at one time during his life and one legitimate child was born of that marriage, but died on July 8, 1965. During at least the last 15 years of Mr. Cultee's life he consistently maintained that he had no children other than his deceased child.

The four petitioners herein contested the validity of Mr. Cultee's will and two full days of hearing were held by the Administrative Law Judge of the Office of Hearing Appeals of the United States Department of the Interior on April 5, 1978, and again on March 29, 1979. The petitioners attacked the will's validity on essentially three grounds:

1. That Mr. Cultee lacked testamentary capacity on the day he made his will both

because he had a history of alcoholism and was suffering from an insane delusion evidenced by his stating in his will that he had no children;

2. That Mrs. Helene Jake as the sole beneficiary under the will exerted undue influence on Mr. Cultee; and

3. That the will failed to comply with one guideline contained in the Bureau of Indian Affairs pamphlet entitled "Instructions to Field Officers," a pamphlet which was designed to help field personnel prepare Indian wills and which advised the manner in which to disinherit one's children.

The Administrative Law Judge rejected each of the petitioners' grounds and on February 21, 1980, entered a Final Order finding that Mr. Cultee's will was validly executed and that Mrs. Helene Jake was the sole heir under the terms of the will. The Administrative Law Judge also found that Mr. Cultee possessed testamentary

capacity to execute a will and that Mr. Cultee was not subject to the undue influence of Mrs. Jake. The Administrative Law Judge held that by a preponderance of evidence the four petitioners were the illegitimate children of Mr. Cultee even though Mr. Cultee had insisted he had no children. The Administrative Law Judge found that the decedent knew what he was doing when he stated he had no children and that his belief was a "result of conscious and deliberate planning" and that Mr. Cultee was certainly not insane for holding this belief. (Final Order, pg. B-42 of Petition for Writ of Certiorari herein filed). Finally, the Administrative Law Judge found that no departmental regulation had been violated in the drafting of the will.

Although the Administrative Law Judge found the will to be valid he ruled that a certain small percentage of the real estate involved could only be distributed

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to Mr. Cultee's heirs at law, the four petitioners herein, and that Mrs. Jake was therefore ineligible to take this portion of the estate. On May 1, 1980, the Petition for Rehearing filed by the four petitioners was denied by the Administrative Law Judge on the ground that the Petition failed to offer new evidence.

On June 24, 1980, the four petitioners filed a Notice of Appeal to the Interior Board of Indian Appeals and on July 27, 1981, the Interior Board entered a decision affirming the Order of the Administrative Law Judge.

On September 28, 1981, the four petitioners filed suit in federal District Court claiming three grounds for relief: (1) that the Department of Interior's failure to follow its instructions regarding the naming of children in a will was a denial of due process; (2) that the failure to follow that instruction was a violation of 25 U.S.C. 373, and (3) that

the approval of the will was therefore an abuse of discretion, as well as arbitrary and capricious. On October 13, 1981, the petitioners amended their Complaint to include an additional ground for relief specifically that the Department of Interior's failure to promulgate regulations protecting pretermitted or unnamed children was a denial of due process and equal protection.

On July 15, 1982, Mrs. Helene Jake filed a Motion for Summary Judgment and the four petitioners' Memorandum in Opposition to the Motion for Summary Judgment raised for the first time the issue which they now argue on appeal. Specifically, that 25 U.S.C. 464 requires Indian wills comply in all aspects with state law.

On September 14, 1982, the District Court granted Mrs. Jake's Motion for Summary Judgment affirming the validity of Mr. Cultee's will for the reasons that

the evidence supported the finding that the document was technically sufficient and a rational testamentary scheme.

On November 12, 1982, the four petitioners filed an appeal in the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals affirmed the judgment of District Court and held that the Administrative Law Judge had properly applied the concepts of both § 373 and § 464 to his review of the will and that the will as modified complied with the federal statutory scheme governing testamentary disposition of Indian property.

SUMMARY OF ARGUMENT

A writ of certiorari should not issue because petitioners have failed to present sufficiently special and important reasons therefor. The petitioners' sole ground for their request that a writ of certiorari should issue is their perception that a conflict exists between the United States Court of Appeals for the

Ninth Circuit and the Supreme Court ruling in Rice v. Rehner, 103 S. Ct. 3291 (decided July 1, 1983). The petitioners' analysis of Rice is incorrect and totally inappropriate to the issue presented here.

ARGUMENT

Rice deals with the use and distribution of liquor within the State of California. As noted by Justice O'Connor, writing for the Court, the issue in Rice is a narrow one and that case does not present any new or broad principles which would warrant the issuance of a writ of certiorari in this matter.

Historically, there has been a tradition of concurrent state and federal jurisdiction over the use and distribution of liquor by Indian tribes and their members. Id at 3298. An important factor, not present in the area of Indian probate questions, but greatly influencing Court decisions regarding liquor use and distribution is the impact upon non-Indians. The

Court in Rice is explicit in referring to this factor and the substantial role it played in the Court's determination. Id at 3298.

Furthermore, the decision in Rice reaffirms those principles of law which recognize the supremacy of the federal law unless Congress has expressly provided that state laws shall apply. Id at 3295. The mere reference to state law in a federal statute is insufficient to allow a state to assert regulatory power over a facet of Indian life. Id at 3307 (Justice Blackman, dissenting, citing Bryan v. Itasca County, 426 U.S. 373, 48 L. Ed. 710, 96 S. Ct. 2102 (1976)).

Petitioners contend that a portion of 25 U.S.C. 464, to-wit, "In all instances such [restricted Indian] lands . . . shall descend or be devised in accordance with the then existing laws of the state, or federal laws where applicable, in which said lands are located . . .," confers state

authority as to the laws of descent and distribution over all Indian probate matters. This contention is erroneous and if adopted would be harmful to the existing federal scheme for Indian probate.

25 U.S.C. 373 governs all those essential matters relative to Indian wills. Nothing in 25 U.S.C. 464 dilutes or removes this power from the federal government. To adopt the petitioners' theory would mean that this Court would have to circumvent the rule cited in Rice at page 3295 against construing legislation to repeal, by implication, an aspect of tribal self-government. There is no reason under this fact situation for the Court to enter such a ruling.

25 U.S.C. 464 was enacted by Congress to prevent the alienation of Indian land outside of Indian ownership. Hydaburg Co-Op Association v. United States, 667 F.2d 64 (1981); See Solicitor's Opinion, 54 I.D. 584 (August 17, 1934). It is

obvious that the intent of Congress has been carried out in this case since respondent Helene Jake is an enrolled member of the Quinault Tribe. There is no showing that Congress ever intended to protect the rights of pretermitted heirs.

Justice Harlan's concurring opinion in Tooahnippah v. Hickel, 397 U.S. 598 (1970) is instructive in reviewing the issues involved herein. It is presumptuous of petitioners to state in their Petition for Certiorari that as learned a student of jurisprudence as Justice Harlan would be unaware of 25 U.S.C. 464 at the time that decision was rendered. It is more likely that he, as well as Chief Justice Burger writing for the Court, was well aware of this section and correctly believed it had no effect upon the operation of 25 U.S.C. 373.

In his opinion, Justice Harlan states that the Secretary of the Interior cannot disapprove an Indian will solely because

the disposition is unfair to someone who would otherwise inherit. Id at 617. Yet the petitioners would ask that this Court do exactly that by using 25 U.S.C. 464. Justice Harlan further points out that Congress "could have only intended to give [the testator] the power to dispose of restricted property according to personal preference rather than the predetermined dictates of intestate succession." Id at 617.

This Congressional intent should not be subverted by an inaccurate and unique reading of 25 U.S.C. 464. The Ninth Circuit's decision is in agreement with the long line of cases decided by this Court, including Rice v. Rehner, supra, and as such the Petition for Writ of Certiorari should be denied.

Finally, mention must be made of the petitioners' attempt to characterize a footnote in Justice Harlan's concurring opinion in Tooahnippah as an invitation to

the Interior Department to promulgate a regulation protecting Indian children from inadvertent disinheritance. It is obvious that Justice Harlan was doing no such thing as suggested by the petitioners. What is important to note is that he obviously believes, § 464 notwithstanding, that it would be necessary for a regulation to be written should the Secretary or Congress even believe such protection to be necessary. It is also very obvious that he believed that it was not the Court's place to rewrite the statutes and regulations dealing with this subject. The respondent, Helene Jake, also believes that it is not this Court's place to undertake the task which Justice Harlan believed it could not do at the time of the Tooahnippah decision.

CONCLUSION

Due to the above reasons, this Court should deny the Petition for a Writ of Certiorari to issue in this case.

RESPECTFULLY SUBMITTED this 17th day of
February, 1984.

LAW OFFICES OF MARY ANNE VANCE

By: _____

MARY ANNE VANCE
Attorney for Respondent
Helene Jake

5-5407

INDIAN WILL UNDER THE ACT OF
JUNE 25, 1910 (36 STAT. 855-856)
As Amended By The Act Of
February 14, 1913 (37 Stat. 678)

LAST WILL AND TESTAMENT

OF

WILLIAM MASON CULTEE Allottee No. 1459
Age 11/16/1927

I, William Mason Cultee of the Quinault
Tribe, of the State of Washington, being
of sound and disposing mind, realizing the
uncertainty of human life, do make this my
Last Will and Testament hereby revoking all
former wills by me made, in manner and form
following, that is to say:

FIRST.-I desire that all my legal debts
be paid, including the expenses of my last
illness, funeral, and burial.

SECOND.-I give, devise, and bequeath to
my First Cousin, HELENE MOWITCHMAN BLACK
JAKE, Quinault allottee 2031, all of my
estate: real, personal or mixed, of whatso-
ever kind or nature and wheresoever situa-
ted, of which I may die seized or ever shall

be possessed.

THIRD.-- To anyone making any claim against my estate - real and/or personal, I leave nothing.

FOURTH.-- I hereby declare that as of the date of this instrument, I am a single person; and that I have no children.

I give, devise, and bequeath all of the rest and residue of my estate, real, personal, and mixed, to: my First Cousin, HELENE MOWITCHMAN BLACK JAKE.

In witness whereof, I, William Mason Cultee, have hereunto set my hand, sealed, published, and declare this to be my Last Will and Testament, this 14th day of August, in the year of our Lord one thousand nine hundred and seventy-three.

/s/ William Mason Cultee (L.S.)
William Mason Cultee

Witnesses:

/s/ L. D. Tadlock
Residing at Hoquiam

/s/ Carl S. Sotomish
Residing at Taholah, Wn

The foregoing instrument of writing was here and now signed by William Mason Cultee in our presence, and at his request and in the presence of each other we have signed as witnesses and he has published and declared this to be his Last Will and Testament.

/s/ L. D. Tadlock
Residing at Hoquiam

/s/ Carl S. Sotomish
Residing at Taholah, Wn.

STATE OF WASHINGTON)
)SS.
COUNTY OF GRAYS HARBOR)

AFFIDAVIT TO ACCOMPANY INDIAN WILL

I, William Mason Cultee, being first duly sworn, on oath, depose and say: That I am an enrolled member of the Quinault Tribe of Indians in the State of Washington; that on the 24th day of July, 1973, I requested Gordon E. Cannon to prepare a will for me; that the attached will was prepared and I requested L. D. Tadlock and Carl S. Sotomish to act as witnesses thereto; that the said witnesses heard me publish and declare the same to be my last will and testament; that I signed said will in the presence of both witnesses and they signed the same as witnesses in my presence and in the presence of each other; and that said will was read and explained to me (or read by me), after being prepared and before I signed it; and it clearly and accurately expresses my wishes; and I further state that no person has influenced me to make

disposition of any part of my property in any other manner than I myself of my own free will desire and wish to dispose of it.

/s/ William Mason Cultee
William Mason Cultee

Allottee No. 1459

We, /s/ L. D. Tadlock and /s/ Carl S. Sotomish, each being first duly sworn, on oath depose and state: That on the 14 day of August, 1973, William Mason Cultee, a member of the Quinault Tribe of Indians of the State of Washington, published and declared the attached instrument to be his last will and testament, signed the same in the presence of both of us and requested both of us to sign the same as witnesses; that we, in compliance with his request, signed the same as witnesses in his presence and in the presence of each other; that said testator was not acting under duress, menace, fraud or undue influence of any person, so far as we could ascertain and in our opinion was mentally capable of disposing of all his estate by

will; and that neither of us is named as a beneficiary in said will or in any wise interested in the distribution of the estate of said testator.

/s/ L. D. Tadlock

/s/ Carl S. Sotomish

5-5408

I, Gordon E. Cannon, being first duly sworn, on oath depose and say: That I am employed as Realty Specialist, Real Prop. at Western Washington Indian Agency in the State of Washington; that on the 24th day of July, 1973, William Mason Cultee an enrolled member of the Quinault Tribe of Indians in the State of Washington requested me to prepare his last will and testament; and at his request I typed said will and submitted for his signature.

/s/ Gordon E. Cannon

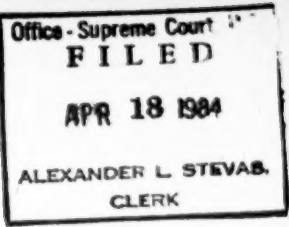
Subscribed and sworn to before me this 14 day of August, 1973, by William Mason Cultee, L. D. Tadlock and Carl S. Sotomish.

/s/ Jean S. Stymer

NOTARY PUBLIC in and for the
State of Washington, residing
at Hoquiam.

My commission expires: 2/25/76

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No. 83-1204

IN THE
Supreme Court of the United States

October Term, 1983

SUSAN LEE CULTEE, et al.
Petitioners,

v.

UNITED STATES OF AMERICA, et al.
Respondents.

ON PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONING CHILDREN

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IN THE
Supreme Court of the United States

October Term, 1983

SUSAN LEE CULTEE, et al.
Petitioners,

v.

UNITED STATES OF AMERICA, et al.
Respondents.

**ON PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

REPLY BRIEF OF PETITIONING CHILDREN

This memorandum is impelled by a critical misstatement in the Government's brief.

The Solicitor General argues at page 6 of the brief that when Congress amended 25 U.S.C. 464 in 1980, it "recognized and approved" the Interior Department's interpretation that Section 464 excludes from BIA probate proceedings the general application of state probate laws, including those which would protect pretermitted children.

However, the House Report cited by the Solicitor¹ actually shows that Congress interpreted Section 464 as incorporating state law generally:

1. H.R. Rep. No. 1285, 96th Cong., 2d Sess. 2 (1980).

The devise and descent of interests in the trust property of deceased Indians is controlled by Federal law. The law provides that the Secretary of the Interior, generally applying the laws of the State in which the property is situated, will probate the estates of deceased Indians holding interests in trust property.²³

This directly contradicts the Solicitor General. Congress believed that Section 464 (Section 4 of the Indian Reorganization Act of 1934) filled the gaps in federal Indian probate law by incorporating consistent provisions of state law. It made the treatment of Indian wills congruent with the treatment of Indian intestate estates, which the Secretary of the Interior has distributed in accordance with the provisions of state intestacy statutes for nearly 100 years, pursuant to 25 U.S.C. 348 (Section 5 of the General Allotment Act of 1887).

RESPECTFULLY SUBMITTED this 17th day of April, 1984.

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT

By: /s/ Samuel J. Stiltner
Samuel J. Stiltner
*Of Attorneys for Petitioning
Children.*

Mason D. Morisset
Of Counsel

2. *Id.* at 3.

3. The Court of Appeals merely cited the House Report for the requirement that devisees be "heirs" as defined by state law. See Pet. App. A-11-A-12. This is but one particular application of the general incorporation of state law.